

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PETER J. BATTAGLIA, JR., and
BATTAGLIA DEMOLITION, INC.,

Plaintiffs,

v.

24-CV-52-LJV-JJM
DECISION & ORDER

OHIO SECURITY INSURANCE
COMPANY,

Defendant.

On August 21, 2023, the plaintiffs, Peter J. Battaglia, Jr., and Battaglia Demolition, Inc., commenced this action in New York State Supreme Court, Erie County. Docket Item 1-1. In their complaint, the plaintiffs brought claims related to a dispute involving a commercial insurance policy issued by the defendants, Ohio Security Insurance Company (“Ohio Security”) and Liberty Mutual Insurance Company¹ (“Liberty Mutual”). *Id.* at 4-8.² On January 11, 2024, the defendants removed the case to this Court. Docket Item 1. Following removal, the case was referred to United States Magistrate Judge Jeremiah J. McCarthy, first for all proceedings under 28 U.S.C. § 636(b)(1)(A), Docket Item 15, and then for all proceedings under 28 U.S.C. § 636(b)(1)(A) and (B), Docket Item 28.

¹ Liberty Mutual Insurance Company was incorrectly named in the initial complaint as “Liberty Mutual Insurance.”

² Page numbers in docket citations refer to ECF pagination.

On January 30, 2025, Ohio Security³ moved to dismiss the amended complaint⁴ under Federal Rules of Civil Procedure 37 and 41 due to the plaintiffs' "refusal to produce documents and provide written responses to document requests and interrogatories." Docket Item 27 at 1. A few days later, plaintiffs' counsel, Frank LoTempio III and other attorneys at LoTempio P.C. Law Group ("LoTempio Law"), moved to withdraw, Docket Item 30, attaching communications from the plaintiffs that appeared to indicate that the plaintiffs did not wish to pursue this matter, *see Docket Item 30-2*. On February 12, 2025, Judge McCarthy held a status conference, at which LoTempio Law confirmed that notice of Ohio Security's motion to dismiss had been provided to the plaintiffs. *See Docket Item 32; see also Docket Item 30-2 at 4* (email from LoTempio Law to Peter J. Battaglia, Jr., attaching Ohio Security's motion to dismiss and noting that "a hard copy" of the motion had been sent via mail).⁵

On February 18, 2025, Judge McCarthy issued a Report and Recommendation ("R&R") finding that Ohio Security's motion to dismiss should be granted and that LoTempio Law's motion to withdraw as counsel should be denied as moot. Docket Item 33. The parties did not object to the R&R, and the time to do so now has expired. *See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2)*.

³ Subsequent to the case's removal, the plaintiffs dismissed their claims against Liberty Mutual. *See Docket Items 12 and 14.*

⁴ The plaintiffs filed an amended complaint on April 11, 2024. Docket Item 11.

⁵ LoTempio Law's notice was sent to Peter J. Battaglia, Jr. Docket Item 30-2 at 4. Battaglia's response indicates that he is the president of Battaglia Demolition, Inc., the other plaintiff in this action. *See id.* at 2.

A district court may accept, reject, or modify the findings or recommendations of a magistrate judge. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). The court must review de novo those portions of a magistrate judge's recommendation to which a party objects. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). But neither 28 U.S.C. § 636 nor Federal Rule of Civil Procedure 72 requires a district court to review the recommendation of a magistrate judge to which no objections are raised. See *Thomas v. Arn*, 474 U.S. 140, 149-50 (1985).

Although not required to do so in light of the above, this Court nevertheless has reviewed Judge McCarthy's R&R as well as the submissions made to him. Based on that review, the absence of any objections, LoTempio Law's confirmation that notice of Ohio Security's motion to dismiss was provided to the plaintiffs, and the communications from the plaintiffs to LoTempio Law, the Court is inclined to accept and adopt Judge McCarthy's recommendation. But because the communications between the plaintiffs and counsel are not explicit, the Court will provide notice to the plaintiffs, and give them one last chance to continue pursuing this case, before dismissing it.

Within 45 days of the date of this decision and order, the plaintiffs shall show cause, either through counsel or directly, why this case should not be dismissed. **If they fail to do so, this case will be dismissed without further order.** If the plaintiffs no longer wish to pursue this matter and communicate that desire to their counsel, LoTempio Law should discontinue the case by filing a stipulation of discontinuance signed on behalf of all parties who have appeared.

In sum, for the reasons stated above and in the R&R, Ohio Security's motion to dismiss, Docket Item 27, will be GRANTED, and LoTempio Law's motion to withdraw,

Docket Item 30, will be DENIED as moot, unless, **within 45 days of the date of this decision and order**, the plaintiffs show cause why the Court should not do so.

LoTempio Law shall make all reasonable efforts, including the use of a process server if necessary, to ensure that the plaintiffs receive this decision and order. The Court will also mail a copy of this decision and order to the plaintiffs by standard and certified mail.

SO ORDERED.

Dated: May 6, 2025
Buffalo, New York

/s/ Lawrence J. Vilardo
LAWRENCE J. VILARDO
UNITED STATES DISTRICT JUDGE